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**U.S. Department of Homeland Security**

**Citizenship and Immigration Services**

*ADMINISTRATIVE APPEALS OFFICE  
CIS, AAO, 20 Mass, 3/F  
425 I Street, N.W.  
Washington, DC 20536*

File: WAC 02 198 52686 Office: CALIFORNIA SERVICE CENTER

Date: APR 21 2004

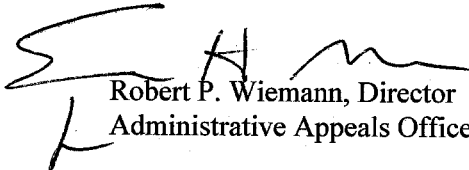
IN RE: Petitioner:  
Beneficiary:

Petition: Immigrant petition for Alien Worker as a Skilled Worker or Professional pursuant to section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

ON BEHALF OF PETITIONER:

**INSTRUCTIONS:**

This is the decision in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

  
Robert P. Wiemann, Director  
Administrative Appeals Office

**DISCUSSION:** The preference visa petition was denied by the Director, California Service Center, and is now before the Administrative Appeals Office on appeal. The appeal will be dismissed.

The petitioner is a restaurant and seeks to employ the beneficiary permanently in the United States as a cook. As required by statute, a Form ETA 750 Application for Alien Employment Certification approved by the Department of Labor accompanies the petition. The director determined that the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage beginning on the priority date of the visa petition.

On appeal, counsel submits a brief and additional evidence.

Section 203(b)(3)(A)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(i), provides for the granting of preference classification to qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing skilled labor (requiring at least two years training or experience), not of a temporary nature, for which qualified workers are not available in the United States.

The regulation at 8 C.F.R. § 204.5(g)(2) states, in pertinent part:

*Ability of prospective employer to pay wage.* Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be in the form of copies of annual reports, federal tax returns, or audited financial statements.

Eligibility in this matter hinges on the petitioner's continuing ability to pay the proffered wage beginning on the priority date, the day the Form ETA 750 was accepted for processing by any office within the employment system of the Department of Labor. Here, the Form ETA 750 was accepted on September 20, 2000. The proffered wage as stated on the Form ETA 750 is \$36,650 per year.

With the petition counsel submitted a photocopy of four pages of the petitioner's 2001 Form 1120S U.S. Income Tax Return for an S Corporation. The return states that the petitioner declared an ordinary income during that year of \$12,385. The corresponding Schedule L shows that at the end of that year the petitioner had current assets of \$10,343 and no current liabilities, which yields net current assets of \$10,343.

Because the evidence submitted was insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date, the California Service Center, on October 16, 2002, requested additional evidence pertinent to that ability. The Service Center stipulated that the evidence should be in the form of copies of annual reports, federal tax returns, or audited financial statements. The Service Center further stipulated that, if tax returns were provided to demonstrate the ability to pay the proffered wage, all schedules and tables should accompany them.

In response, counsel submitted a letter, dated October 24, 2002, from the petitioner's accountant. In that letter, the accountant cited the petitioner's depreciation deduction and officer salaries as evidence of the petitioner's ability to pay the proffered wage. The accountant also stated that the beneficiary would

replace a current employee, but did not identify that current employee or offer any evidence in support of that assertion.

In addition, counsel submitted a copy of the petitioner's 2000 Form 1120S U.S. Income Tax Return for an S Corporation and a complete copy of its 2001 tax return. The 2000 return shows that the petitioner declared ordinary income of \$41,828 during that year. Although counsel stated in his cover letter that all schedules and tables were provided with that return, no Schedule L was provided.<sup>1</sup>

The director determined that the evidence submitted did not establish that the petitioner had the ability to pay the proffered wage and, on February 13, 2003, denied the petition.

On appeal, counsel states that the proffered wage is \$704.80 per week, which equals \$33,830 per year. This office notes that counsel's arithmetic is incorrect and that, in any event, the Form ETA 750 states that the proffered wage is \$36,650 per year. Neither counsel nor this office is able to vary the terms of an approved labor certification. The petitioner is obliged to demonstrate the ability to pay the proffered wage as stated on the Form ETA 750 labor certification.

Counsel urges that the accountant's letter, noted above, which emphasized the petitioner's depreciation deductions and officer salaries, demonstrates the petitioner's ability to pay the proffered wage. Further, counsel cites *Matter of Sonegawa*, 12 I&N Dec. 612 (Reg. Comm. 1967), for the proposition that the petitioner's low profit may be disregarded. Finally, counsel provides a letter from the petitioner's owner stating that the company has never laid off any employees based on cash flow and detailing the growth of the payroll from four employees in 1999 to ten employees in 2002.

The opinion of the petitioner's accountant, expressed in the letter of October 24, 2002, is not determinative. 8 C.F.R. § 204.5(g)(2) states that copies of annual reports, federal tax returns, and audited financial statements are competent evidence of the ability to pay the proffered wage. The accountant's letter is merely comment on the evidence, not competent evidence in itself that the petitioner is able to pay the proffered wage.

The accountant's reliance on the petitioner's depreciation expense and officer salaries is misplaced. The accountant is correct in implying that a depreciation deduction does not represent a specific cash expenditure during the year claimed. It is a systematic allocation of the cost of a long-term asset. It may be taken to represent the diminution in value of buildings and equipment, or to represent the accumulation of funds necessary to replace perishable equipment and buildings. The value lost as equipment and buildings deteriorate is an actual expense of doing business, whether it is spread over more years or concentrated into fewer.

While the expense does not require or represent the current use of cash, neither is it available to pay wages. No precedent exists that would allow the petitioner to add its depreciation deduction to the amount available to pay the proffered wage. *Chi-Feng Chang v. Thornburgh*, 719 F.Supp. 532 (N.D.

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<sup>1</sup> Although the tax returns submitted bear the petitioner's taxpayer identification number, the name of the taxpayer on those returns is Navjots, rather than the petitioner's name, Lotus Cuisine of India. If the petitioning business was sold or otherwise changed hands since the priority date, the current petitioner would be obliged to demonstrate that it is a true successor-at-interest of the original petitioner within the meaning of *Matter of Dial Repair Shop* 19 I&N Dec. 481 (Comm. 1981). Because the evidence contains sufficient other reasons to deny the petition, however, this office will not dwell on the possibility that a change in ownership occurred.

Texas 1989). See also *Elatos Restaurant Corp. v. Sava*, 632 F.Supp. 1049, 1054 (S.D.N.Y. 1986). The petitioner's election of accounting and depreciation methods accords a specific amount of depreciation expense to each given year. The petitioner may not now shift that expense to some other year as convenient to its present purpose, nor treat it as a fund available to pay the proffered wage.

Officer salaries are an expense. If the petitioner wished to demonstrate all or some portion of its officer salaries were optional and could have been used to pay the proffered wage, then the petitioner was obliged to submit evidence in support of that proposition. No such evidence was submitted. This office cannot find that any portion of the petitioner's officer salaries was available to pay the proffered wage.

Showing that the petitioner's gross receipts exceeded the proffered wage is insufficient. Showing that the petitioner paid wages in excess of the proffered wage is insufficient. Unless the petitioner can show that hiring the beneficiary would somehow have reduced its expenses<sup>2</sup> or otherwise increased its net income<sup>3</sup>, the petitioner is obliged to show the ability to pay the proffered wage **in addition to** the expenses it actually paid during a given year. The petitioner is obliged to show that the remainder after all expenses were paid was sufficient to pay the proffered wage. That remainder is the petitioner's ordinary income.

In determining the petitioner's ability to pay the proffered wage, CIS will examine the net income reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. CIS may rely on federal income tax returns in assessing a petitioner's ability to pay a proffered wage. *Elatos Restaurant Corp. v. Sava*, 632 F.Supp. at 1054 (citing *Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984); see also *Chi-Feng Chang v. Thornburgh*, *Supra* at 537; *K.C.P. Food Co., Inc. v. Sava*, 623 F.Supp. 1080 (S.D.N.Y. 1985); *Ubeda v. Palmer*, 539 F.Supp. 647 (N.D. Ill. 1982), *Aff'd*, 703 F.2d 571 (7th Cir. 1983). In *K.C.P. Food Co., Inc. v. Sava*, the court held that the INS, now CIS, had properly relied upon the petitioner's net income figure, as stated on the petitioner's corporate income tax returns, rather than the petitioner's gross income. *Supra* at 1084. The court specifically rejected the argument that the INS, now CIS, should have considered income before expenses were paid rather than net income.

The priority date is September 20, 2000. The proffered wage is \$36,650 per year. During 2000, the petitioner is not obliged to show the ability to pay the entire proffered wage, but only that portion which would have been due if the petitioner had hired the beneficiary on the priority date. On the priority date, 264 days of that 366-day year had elapsed, and 102 days remained. The petitioner is obliged to show the ability to pay the proffered wage during the remaining 102 days of that year. The proffered wage multiplied by 102/366<sup>th</sup> equals \$10,213.93, which is the amount the petitioner must show the ability to pay during 2000.

During 2000, the petitioner declared ordinary income of \$41,828. The petitioner was able to pay the salient portion of the proffered wage out of ordinary income during that year. The petitioner has demonstrated the ability to pay the proffered wage during 2000.

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<sup>2</sup> The petitioner might demonstrate this, for instance, by showing that the petitioner would replace a specific named employee, whose wages would then be available to pay the proffered wage. In this case, the petitioner's accountant stated that the beneficiary would replace a current employee, but provided no evidence of that assertion.

<sup>3</sup> The petitioner might be able to demonstrate that hiring the beneficiary would contribute more to its receipts than the amount of the proffered wage.

During 2001, the petitioner is obliged to demonstrate the ability to pay the entire proffered wage. During 2001 the petitioner declared an ordinary income during that year of \$12,385 and ended the year with net current assets of \$10,343. The petitioner has not demonstrated the ability to pay the proffered wage out of its income or its net current assets during 2001 and has not demonstrated that any other funds were available to pay the proffered wage.

Counsel asserts that, pursuant to *Matter of Sonegawa, Supra.*, this office should disregard any year during which the petitioner's income and assets were insufficient to cover the proffered wage.

*Sonegawa*, however, relates to petitions filed during uncharacteristically unprofitable or difficult years but only within a framework of profitable or successful years. During the year in which the petition was filed in that case the petitioner changed business locations and paid rent on both the old and new locations for five months. The petitioner suffered large moving costs and a period of time during which the petitioner was unable to do regular business.

In *Sonegawa*, the Regional Commissioner determined that the petitioner's prospects for a resumption of successful business operations were well established. The petitioner was a fashion designer whose work had been featured in *Time* and *Look* magazines. Her clients included Miss Universe, movie actresses, and society matrons. The petitioner's clients had been included in the lists of the best-dressed California women. The petitioner lectured on fashion design at design and fashion shows throughout the United States and at colleges and universities in California. The Regional Commissioner's determination in *Sonegawa* was based in part on the petitioner's sound business reputation and outstanding reputation as a couturière.

Counsel is correct that, if its inability to pay the proffered wage during 2001 out of either its ordinary income or its net current assets was uncharacteristic and occurred within a framework of significantly more profitable or more successful years, then that inability might be overlooked in determining ability to pay the proffered wage. Here, the evidence does not demonstrate that the petitioner's low profits during 2001 were uncharacteristic. Assuming that the petitioner's business will flourish, with or without hiring the beneficiary, is speculative.

The petitioner failed to submit evidence sufficient to demonstrate that it had the ability to pay the proffered wage during 2001. Therefore, the petitioner has not established that it had the continuing ability to pay the proffered wage beginning on the priority date.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

**ORDER:** The appeal is dismissed.